91-1170 (1)

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

SNOWSHOE COMPANY, JOSEPH F. BURFORD and S. FRANKLIN BURFORD,

Petitioners,

vs .

MICHAEL L. BRAY and THE TRAVELERS INDEMNITY COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a trustee in bankruptcy who, (a) with respect to the bankruptcy estate, had conflicting adverse interests; (b) did not reveal to the Court those conflicting adverse interests; and, (c) dealt, as such trustee on behalf of the bankruptcy estate, directly with those with whom he held those conflicting adverse interests; is liable, along with his bonding company, for the losses sustained from those dealings?

2. Whether the District Court violated the law and the First Amendment to the Constitution, by (a) barring the plaintiffs, at all times while the case was pending (2 and 3/4 years), from all discovery; (b) ignoring all evidence (uncontradicted by the defendants) presented by the plaintiffs by affidavit, exhibit and requested judicial notice; (c) refusing to grant the plaintiffs the requested hearings mandated by F.R.C.P. 16(b), 26(f) and 56(c); (d) refusing to hold any trial or hearings, at all, and , then, (e) granting a summary judgment to the defendants?

NOTE - PARTIES TO THE PROCEEDING

The parties to this proceedings in the Fourth Circuit are as follows:

Petitioners:

Snowshoe Company, a corporation,
Joseph F. Burford,
S. Franklin Burford, and
The United States Of America,
a technical appellant,
(Under Bankruptcy Rule 2010(c)).

Respondents:

Michael L. Bray, and
The Travelers Indemnity Company.

NOTE - SNOWSHOE COMPANY, A CORPORATION

The Snowshoe Company has no parent corporation and no subsidiaries (other than wholly owned) (Supreme Court Rule 29.1)).

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IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

In Re: SNOWSHOE COMPANY,

Debtor.

UNITED STATES OF AMERICA, by and for others, and the SNOWSHOE COMPANY, JOSEPH F. BURFORD and S. FRANKLIN BURFORD, in their own right,

Petitioners,

vs .

MICHAEL L. BRAY and THE TRAVELERS INDEMNITY COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

None of the opinions below has been officially reported. The Fourth Circuit opinion denying rehearing, filed December 16,1991, is reprinted in the Appendix, beginning at A-1. The opinion-of the Fourth Circuit, filed November 13, 1991, is reprinted in the Appendix beginning at A-5 The District Court decisions and orders filed November 30, 1990 and January 25, 1991 are reprinted, respectively, in the appendix, beginning at A-10 , A-31 , A-33 , and A-36 .

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and 28 U.S.C. Section 2101(c). The judgment denying rehearing of the Court of Appeals for the Fourth Circuit was entered on December 16, 1991. This Petition is timely, having been filed within ninety (90) days of that date.

PROVISIONS OF LAW INVOLVED

Amendment 1 to the Constitution of the United States, in relevant part, provides:

"Congress shall make no law *** abridging *** the right of the people *** to petition the Government for a redress of grievances."

The statutory provisions of Title 11, United States Code,in relevant part, provide :

§ 101. Definitions. In this title--

***

(13) "disinterested person" means person that--

***

> (E) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor ***, or for any other reason.

§ 324. Removal of trustee or examiner. The Court, after notice and a hearing, may remove a trustee or an examiner, for cause.

§ 326. Limitation on compensation of trustee.

> (a) In a case under chapter 7 or 11, the court may allow reasonable compensation under section 330 of this title of the

trustee for the trustee's services, payable after the trustee renders such services, not to exceed fifteen percent on the first $1,000 or less, six percent on any amount in excess of $1,000 but not in excess of $3,000, and three percent on any amount in excess of $3,000, upon all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims.

***

(d) The court may deny allowance of compensation for services or reimbursement of expenses of the trustee if the trustee failed to make diligent inquiry into facts that would permit denial of allowance under section 328(c) of this title or, with knowledge of such facts, employed a professional person under section 327 of this title.

§ 327. Employment of professional persons.

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

***

§ 328. Limitation on compensation of professional persons.

***

(c) Except as provided in ***, the court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 *** of this title if, at any time during such professional person's employment under section 327 *** of this title, such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed.

§ 330. Compensation of officers.

(a) After notice and a hearing, and subject to sections 326,328 and 329 of this title, the court may award to a trustee, ***, to a professional person employed under section 327 *** of this title, ***

(1) reasonable compensation for actual, necessary services rendered by such trustee, ***, professional person or attorney, as the case may be,and by any paraprofessional persons employed by such trustee, professional person, or attorney, as the case may be, based on the nature, the extent, and the value of such services, the time spent on such services, and the cost of comparable services other than in a case under this title; and

(2) reimbursement for actual, necessary expenses.

§701. Interim trustee.

(a) Promptly after the order for relief under this chapter, the court shall appoint one disinterested person *** to serve as

interim trustee in the case.

***

(c) An interim trustee serving under this section is a trustee in a case under this title.

§ 702. Election of trustee.

***

(d) If a trustee is not elected under this section, then the interim trustee shall serve as trustee in the case.

The Bankruptcy Rules, in relevant part, provide.

Rule 2010:

(c) Proceeding on Bond. A proceeding on the Trustee's bond may be brought by any party in interest in the name of the United States for the use of the entity injured by The breach of the condition.

Rule 2014:

(a) Application for and Order of Employment. An order approving the employment of attorneys, *** pursuant to § 327 *** of the Code shall be made only on application of the Trustee ***, stating the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants.

***

STATEMENT OF THE CASE

A. proceedings and Disposition Below.

This is a suit (Adversary Proceeding) for Surcharge of Trustee and Recovery on Bond under Bankruptcy Rules 2010(c) and 7001, which was brought in the bankruptcy case of In Re Snowshoe Company, Debtor, then pending in the Bankruptcy Court. Petitioners filed and served, on April 13, 1988, their Summons and Complaint, along with 39 Requests for Admission. Petitioners alleged the Trustee's violations of his official duties as Trustee of the Bankruptcy Estate of the Snowshoe Company; which violations by the Trustee had, (a) resulted in losses to the Snowshoe Company, its Bankruptcy Estate, creditors and shareholders of $32,206,806.53, and (b) consisted of the Trustee's dealings with Shenandoah Federal Savings and Loan Association (Shenandoah), and others, with whom the Trustee and the law firm (the Trustee's Counsel) of which he is a partner had conflicting adverse interests that were never revealed by the Trustee or his Counsel, to the Court: not even revealed, (1) when the Court had directed him (the Trustee) to reveal "actual conflicts"; (2) in accordance with the mandatory requirements of Bankruptcy Rule 2014(a); (3) each time the Trustee obtained Court approval of his dealings with the interested parties with whom he held the undisclosed conflicting interests; or (4) each time he (the Trustee) obtained Court approval of his and his Counsels fees and expenses.

Even though the Bankruptcy Judge had previously (November 25, 1987) disqualified himself in the Snowshoe Company bankruptcy case, because of his bias and prejudice for the law firm of which the Trustee is a partner; the Bankruptcy Judge had continued to preside in that case. Therefore, the petitioners filed in this case a motion for the Bankruptcy Judge to disqualify himself, again.

The respondents did not respond to the petitioners' Requests for Admission. On May 11, 1988, both respondents filed Answers and simultaneously, moved to transfer the case to

the District Court and for a Stay of all Discovery.

Petitioners responded, on May 17, 1988, with an objection to any Stay of Discovery, but with no objection to Removal to the District Court.

By Order of May 25, 1988, the Bankruptcy Judge granted the petitioners' motion for his disqualification. However, in the same order he directed that this case be referred to the District Court and ordered that all discovery was Stayed which Stay has, to this day, remained in effect.

The case was transferred to the District Court, and, on June 9, 1988, petitioners made a motion for summary judgment. The motion was backed by a Memorandum of Law, stating that the Supreme Court decision in *Mosser v. Darrow*, 341 U.S. 267 (1951) required the granting of a summary judgment to the petitioners, and an affidavit, with exhibits, which established all of the allegations of the Complaint.

On July 19, 1988, the respondents made a cross motion for summary judgment. This motion was backed by a Memorandum of Law and two affidavits, with exhibits. Those affidavits and exhibits contradicted nothing in the petitioners' Complaint or affidavit and exhibits and stated that the Snowshoe Company had prior knowledge of some (not including those with Shenandoah) of the Trustee's and his law firm's conflicting adverse interests.

On July 26, 1988, petitioners filed a Memorandum of Law responding to the cross motion, together with a second affidavit. Thereafter, the petitioners, (1) moved, on September 13, 1988, for the scheduling order mandated by Federal Rule of Civil Procedure 16 (b); (2) moved, on September 29, 1988, to terminate the stay of discovery; (3) made, on November 15, 1988, a first motion for judicial notice; (4) made, on November 16, 1988, a second motion for judicial notice; (5) moved, on January 13, 1989, for the discovery conference mandated by Federal Rule of Civil Procedure 26 (f); (6) moved, on March 31, 1989, for authority to submit second requests for admission; (7) renewed, on September 12, 1989, their motion for summary judgment; (8) moved, on October 23, 1989 (after the District

Court had Ordered that this case "should initially be addressed by the Court as consolidated" with two other cases under the Snowshoe Company bankruptcy case), for the just, speedy and inexpensive determination of this action; (9) filed, on January 19,1990, a Trial Brief; and (10) moved, separately, on January 23, 1990, for authority to depose four different individuals.

Each of the foregoing motions was backed by a Memorandum of Law and was responded to by the respondents. However, none of the foregoing motions, except the motions for summary judgment, were ever ruled on by the District Court, nor, did the District Court hold any trial or hearing or permit discovery or oral argument.

By MEMORANDUM and JUDGMENT ORDER, both dated November 30, 1990, the District Court (along with final orders in the other two consolidated cases)"GRANTED" the respondents' motion for summary judgment and "DENIED" the petitioners' motion for summary judgment in this case. Those judgments of the District Court were predicated on the District Judge's opinion, (1) that, although the Trustee had never disclosed his conflicting adverse interests to the Court, the Court's Orders approving the Trustee's dealings with those (Shenandoah and others) with whom he held the conflicting adverse interests, gave the Trustee "immunity" from any liability for the losses sustained from those dealings, and (2) that one of the petitioners, the Snowshoe Company, did not, with the undersigned attorney as its Counsel, have "standing to pursue this action". Petitioners filed a motion for amendment of judgment, a motion for a hearing (none had been held) and a motion for the Court to make findings of fact (petitioners presented specific facts, in numbered paragraphs, that they suggested were required to be found) on December 6, 1990. On January 25, 1991, the District Court denied those motions. The petitioners appealed to the Fourth Circuit on January 31, 1991. Oral arguments were heard in the Fourth Circuit on October 1, 1991 and a Per Curiam Unpublished Opinion, affirming, "on the reasoning of the district Court", the District Court's grant of summary judgment to the respondents and denial of summary

judgment to the petitioners, was filed on November 13, 1991. On November 18, 1991 the petitioners filed a petition for rehearing, which was denied on December 16, 1991. Petitioners now seek certiorari in this case which was numbered, both, No. 91-1419 and No. 91-1433 in the Fourth Circuit and No. 88-84-E in the District Court.

B. Proven Facts.

On May 24, 1985, the District Court (the Snowshoe Company bankruptcy case was then pending, as a Chapter 11 reorganization case, in the District Court), without taking or permitting any evidence, converted the Snowshoe Company Chapter 11 case to a Chapter 7 case, and, immediately, appointed Michael L. Bray to be the Trustee of the Snowshoe Company Estate, and Bray's law firm (Steptoe & Johnson) as Counsel to the Trustee. However, prior to those appointments, the District Judge posed a question to Michael L. Bray: "Let me ask you if you find in the words of the statute any representation or clients or claims or otherwise, as in the words of the statute, would create a "actual conflict" under the statute to your serving as the Trustee?"

At that time, Michael L. Bray and his law firm, Steptoe & Johnson, had the following adverse interests, which conflicted and conflict with the positions of Trustee and Counsel to the Trustee of the Snowshoe Company Estate:

1. Steptoe & Johnson represented the Snowshoe Company in the Snowshoe Company's defense of many tort actions;

2. Steptoe & Johnson represented the Tory Mountain Ski Resort, which was in construction and to be a competitor of the Snowshoe Ski Resort;

3. Steptoe & Johnson represented the ABAS Company, a 10% shareholder in the Snowshoe Company and the controlling owner of the Tory Mountain Ski Resort;

4. Steptoe & Johnson represented Thomas H. Brigham, a 9% shareholder in the Snowshoe Company and a partner in

the ABAS Company;

5. Steptoe & Johnson represented H.S. Smith, an 8% shareholder in the Snowshoe Company;

6. Patrick D. Deem, another partner in Steptoe & Johnson, had, on behalf of the ABAS Company, negotiated and concluded a secret side deal with Shenandoah (the Snowshoe Company's largest creditor) to assist Shenandoah in acquiring the Snowshoe Resort at half of its value;

7. Patrick D. Deem had actively sought to accomplish Shenandoah's goal by voting (as proxy) the ABAS Snowshoe Company stock in favor of that result, without revealing the secret "Shenandoah-ABAS deal" to the Snowshoe Company or its other stockholders;

8. Michael L. Bray, just seven months earlier, had, in a previous Snowshoe Company bankruptcy proceeding (dismissed by the Bankruptcy Judge, *sua sponte*), joined with Shenandoah and, without Bray or Shenandoah revealing the "Shenandoah-ABAS deal", sought to have a trustee appointed for the Snowshoe Company;

9. Michael L. Bray, just two months earlier, had moved for and obtained, *ex parte*, (no notice to the Snowshoe Company or its Counsel), the quashing of the Snowshoe Company's deposition subpoena of Patrick D. Deem, which subpoena had been issued in connection with the Snowshoe Company's suit against Shenandoah and the quashing of which was in violation of (a) Local District Court Rule 2.07; (b) Rule 3.3(d) of the ABA Rules of Professional Conduct; and (c) Canon 3A(4) of the ABA Code of Judicial Conduct;

10 Michael L. Bray represented the Ford Motor Credit Company, a creditor of the Snowshoe Company;

11. Michael L. Bray represented the John Deere Industrial Equipment Company, a creditor of the Snowshoe Company; and

12. Michael L. Bray represented the Charleston Linen Service, a creditor of the Snowshoe Company.

In response to the District Court Judge's question about the existence of "actual conflicts", Michael L. Bray did not

answer with the truth, as stated above, but stated only:

> "Your Honor, as the Court is aware, I have represented the Ford Motor Credit Company, John Deere Industrial Equipment Company and the Charleston Linen Service and three minority shareholders in these proceedings."

Rule 2014(a) of the Bankruptcy Rules required Michael L. Bray to file an application for the employment of Steptoe & Johnson as his attorneys, which application was required to state, among other things, all of Steptoe & Johnson's "connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants".

Neither Michael L. Bray nor Steptoe & Johnson have ever complied with Bankruptcy Rule 2014(a).

Following his appointment as Trustee, Michael L. Bray, with court approval, but without any disclosure by Bray of his conflicting adverse interest with the Tory Mountain Ski Resort, appointed two officers of and investors in the Tory Mountain Ski Resort to be the "General Manager" and "Assistant General Manager" of the Snowshoe Ski Resort. In addition to large salaries, the Snowshoe Company Estate paid for the meals and lodging of those managers.

Prior to Bray becoming Trustee, the Snowshoe Company had brought suit against Shenandoah and two of its executives. On March 24, 1986, Michael L. Bray, without revealing to the Court his conflicting adverse interests with Shenandoah, applied to the District Court for authority to abandon that suit. The undersigned, then, offered to buy that cause of action for (a) $5,000 and (b) payment of 50% of the net recovery to the creditors of the Snowshoe Company. The District Court, on July 1, 1986 approved that sale and authorized Michael L. Bray to effect it.

That Court Order of July 1, 1986 did not cause Michael L. Bray to stop his efforts to destroy the Snowshoe Company suit against Shenandoah and its officers.

With the approval of the District Court, but without any revelation, by either Michael L. Bray or Shenandoah, of the

conflicting adverse interests which they had with each other, Michael L. Bray entered into an AGREEMENT OF PURCHASE with David W. Ralston, as agent for SKI VENTURE, INC. (In Formation). David W. Ralston was one of the defendants in the Snowshoe Company suit against Shenandoah, et. al. Ski Venture, Inc. (In Formation) was a corporation being formed by Shenandoah and the other banks that had participated in its loans to the Snowshoe Company.

According to the Appraisal made by professional appraisers in the employ of Shenandoah's wholly owned subsidiary, the Snowshoe Resort had a market value as of June 20, 1982 of $31,500,000. And, the Bankruptcy Court, in the previous Snowshoe Company bankruptcy proceeding (dismissed *sua sponte*), had judicially determined, by its decision of February 19, 1985, that "the fair market value of Snowshoe's assets is in excess of $19 million by a substantial sum".

The AGREEMENT OF PURCHASE provided for the sale of all of the assets of the Snowshoe Company Estate (including, by specific designation, the Snowshoe Company v. Shenandoah et. al. law suit) to Ski Venture, Inc, (In Formation) for a consideration of (a) $1,000,000 to be paid to Michael L. Bray; (b) satisfaction of a $1.5 million debt incurred by Michael L. Bray, as Trustee (not a debt of the Snowshoe Company); (c) assumption (not satisfaction, thus leaving the Snowshoe Company Estate, the Snowshoe Company and the endorsing shareholders still liable for these debts) of $11,831,885.82 owed by the Snowshoe Company Estate, the Snowshoe Company and its endorsing shareholders to Shenandoah; and (d) assumption (not satisfaction, thus leaving the Snowshoe Company Estate, the Snowshoe Company and the endorsing shareholders liable for these debts) of $415,272.29 owed by the Snowshoe Company Estate, the Snowshoe Company and its endorsing shareholders to other creditors.

The District Court later determined that the attempted transfer by Bray of the Snowshoe Company v. Shenandoah, et. al. suit to Ski Venture, Inc (In Formation) was not valid and on January 20, 1987 Bray complied with the terms of the July 1,

1986 Court Order and transferred that suit to the undersigned, who complied with the terms of that Order.

In violation of Sections 326(a) and (d), 327(a), 328(c) and 330, of the Bankruptcy Code, Michael L. Bray, by never revealing to the Courts his and Steptoe & Johnson's conflicting adverse interests, and presenting no evidence to the Courts, whatsoever, has, with Court approval, been able to extract from the Snowshoe Company Estate, as "fees and expenses" more than $450,000. Over and above his other losses; Michael L. Bray, while operating the Snowshoe Resort, had "operating Losses" of over $4,000,000.

REASONS FOR GRANTING THE WRIT

Never before has there existed a case such as this. With the approval of the Fourth Circuit Court of Appeals (without any independent reason given for its approval), the District Court for the Northern District of West Virginia, in violation of the First Amendment of the Constitution of the United States, deprived the petitioners of every right granted to them by the Federal Rules of Civil Procedure.

Oh, yes; the petitioners were permitted to "petition" for a "redress of their grievances": They were allowed to file a Complaint. But, once before the court, the petitioners were blinded, gagged and ignored for almost four years. At no point were the Federal Rules of Civil Procedure followed. Federal Rule of Civil Procedure 1, requiring: a "just, speedy and inexpensive determination", wasn't followed. Rule 16, which mandates a "scheduling order" by the district court, wasn't followed. None of the Rules on Discovery (Rules 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, and 37,) were followed or allowed to be followed by the petitioners; even though the petitioners, by seven (7) separate motions, demanded the right to follow those rules. The required hearing, under Rule 56 was never held. And, there was never a hearing or trial of anything. For two years and seven months the District Court just let the petitioners "gently dangle in the breeze"; then, granted a summary judgment to the

respondents. And, one year later, the Fourth Circuit (with no reason given) approved that procedure.

And, what decision of substantive law did the courts below make in this case? Under our bankruptcy law, as decided by the District Court and approved by the Fourth Circuit, a Trustee in Bankruptcy (a) is permitted to hold twelve (12) adverse interests, six (6) of which the Trustee never revealed to the Court, which conflicted with the interest of the Bankrupt Estate; (b) is not to be removed, pursuant to 11 U.S.C. § 324, from that position because of those adverse, conflicting interests; (c) may deal directly with those with whom he held the undisclosed conflicting adverse interests; and (d) is not liable, by either surcharge or under his bond, for the losses, by the bankrupt, its estate, creditors and shareholders, resulting from those dealings.

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE FOURTH CIRCUIT COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION OF BANKRUPTCY LAW IN A WAY THAT CONFLICTS WITH (A) THE APPLICABLE DECISION OF THIS COURT IN *MOSSER V. DARROW*, 341 U.S. 267 (1951); AND (B) THE PROVISIONS OF THE BANKRUPTCY CODE OF 1978.

The Bankruptcy Code of 1978 barred Michael L. Bray from acting, at any time, in the capacity of Trustee of the Snowshoe Company Estate. Under the Code, only a "disinterested person" may be a bankruptcy trustee. 11 U.S.C. 701(a) And, under U.S.C §101(13)(E) a "disinterested person" is one who " does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in the debtor ***, or for any other reason".

Because of his twelve conflicting adverse interests, Michael L. Bray was, at no time, a "disinterested person" and, thus, was, at no time, authorized to act as Trustee of the

Snowshoe Company Estate. Also, Steptoe & Johnson was, at no time, a "disinterested person" and was, therefore, barred, at all times, by 11 U.S.C. § 327(a), from acting as Counsel to the Trustee of the Snowshoe Company Estate. Moreover, Steptoe & Johnson was prevented from serving as Counsel, as that law firm, under Bankruptcy Rule 2014(a), could become Counsel "only on application of the trustee" (Bray) stating, among other things, all of Steptoe & Johnson's "connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants". That Rule 2014(a) application was never made by Bray or anyone else.

The most devastating fact of all is, of course, the fraud practiced on the District Court by Michael L. Bray. When standing before the Court, as an officer of the Court, and directed by the District Court Judge to reveal any "actual conflicts"; Bray lied. He only named three creditors and mentioned three, unnamed shareholders. He stated nothing to the Court about his and Steptoe & Johnson's extensive dealings with Shenandoah, which was and is the Snowshoe Company's largest creditor, which dealings directly involved the Snowshoe Company and its financial wellbeing.

The decision of this Court in *Mosser v. Darrow*, 341 U.S. 267 (1951), which is in direct conflict with the decision of the Fourth Circuit in this case, controls the legal consequences that are required to flow from Bray's fraud on the Court.

In its *Mosser* decision, this Court held that a bankruptcy trustee has liability for any detriment to the bankruptcy estate from the trustee's dealings with any person with whom the trustee had an adverse interest, which adverse interest had not (a) been fully disclosed by the trustee to the court and the other interested parties; and (b) received the full consideration and approval of the court.

The reasoning of this Court, in *Mosser*, was that even though Mr. Darrow, the Trustee, was guilty of no act of bad faith (Mr. Bray, has, in this case, proved his "fraud" and "bad faith"), the bankruptcy trust is a "strict trust" and that:

"Equity tolerates in bankruptcy trustees no

> interest adverse to the trust. This is not because such interests are always corrupt but because they are always corrupting". 341 U.S. 267, at 271.

The District Court's reasoning, that the District Court's own orders approving Bray's dealings with those (Shenandoah and others) with whom he held the undisclosed conflicting adverse interests, gave Bray "immunity" from his liability for the losses sustained from those dealings, is in direct conflict with *Mosser* and cannot be accepted as an exception to *Mosser.*

As Bray did not reveal the conflicts, there was a fraud on the court. A fraudulently obtained order of the court cannot grant "immunity" to the one practicing the fraud. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944).

Indeed, the *Mosser* decision, itself, explains how Bray could have, if he had been honest, obtained "immunity". The Court in *Mosser* stated:

> "The practice is well established by which trustees seek instructions from the court, given upon notice to creditors and interested parties, as to matters which involve difficult questions of judgment". 341 U.S. 267, at 274.

Had Bray revealed his conflicts with Shenandoah and the others, by notice to the other interested parties and, after its consideration, receiver the court's approval (difficult, though it is to imagine) of those conflicts; then, and only then, would Bray have achieved "immunity".

Bray didn't reveal those conflicting interests, even though directed by the District Court Judge to reveal them, and he, therefore, had no court approval of those conflicts and the court orders he thereby obtained cannot give him "immunity".

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE FOURTH CIRCUIT COURT OF APPEALS HAS SANCTIONED A PROCEDURE IN THE DISTRICT COURT THAT (A) DEPARTS FROM THE REQUIREMENTS OF THE FIRST AMENDMENT TO THE CONSTITUTION AND THE FEDERAL RULES OF CIVIL

PROCEDURE; AND (B) CALLS FOR THE EXERCISE OF THIS COURT"S POWER OF SUPERVISION.

The procedural question presented by this petition is moot, if this Court decides, upon any consideration of this case on the merits, that the affidavits, exhibits and requests for judicial notice, pursuant to Federal Rule of Civil Procedure 56(c), "show that there is no genuine issue as to any material fact" and that the petitioners should prevail on their motion for summary judgment. Unfortunately, neither the District Court (though requested by the petitioners) nor the Fourth Circuit made any findings of fact and, during the entire case, all discovery was prohibited and there was no trial or any hearing in the District Court.

If, of course, it is decided that there is a "genuine issue" as to any "material fact", then, it is the procedural issue that dictates that this Court exercise, in this case, its power of supervision over the lower courts.

At the commencement of this case and after the petitioners had served on the respondents, pursuant to the authority of Federal Rule of Civil Procedure 33(a), 39 Requests for Admission, it was the Bankruptcy Court that, on May 25, 1988, stayed all discovery. Thereafter, it was the District Court that perpetuated that stay of discovery to this very day.

The proceedings below were a throwback to the days before pretrial discovery became a staple of federal litigation. The petitioners found themselves deprived of the right to ascertain any evidence of any fact. In this way, the backroom dealings of Trustee Bray and Shenandoah, which began--as all such unscrupulous deeds do--in the dark, were kept hidden in the dark through the complicity of the Bankruptcy Court and the District Court. A more striking and obvious instance of abuse of judicial discretion is difficult to imagine. Under these circumstances, the petitioners were denied their day in court and, a fortiori, having been denied a right to any trial at all, were denied a fair trial.

The first amendment to the United States Constitution,

and, in particular, the right to petition the government for a redress of grievances, guarantees parties the right to have access to the courts. *Bounds v. Smith*, 430 U.S. 817 (1977). Yet, what is the good of access to the courts to a litigant who is denied the chance to present his grievance? A day in court means more than simply appearing in silence before a judge. It means the opportunity to have one's grievances heard. Justice, after all, is supposed to be blind, not deaf.

This Court, in *Hickman v. Taylor*, 329 U.S. 495 (1947), stated:

> "The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure ***. The new rules *** invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need to be carried on in the dark. The way is now clear *** for the parties to obtain the fullest possible knowledge of the issues and facts before trial".

Id. at 500-01 (footnote omitted). And, in *United States v. Proctor & Gamble, Co.*, 356 U.S. 677 (1958), this Court stated:

> "Modern instruments of discovery serve a useful purpose, as we noted in *Hickman v. Taylor*, 329 U.S. 495. They together with pretrial procedures make a trial less a game of blind man's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent".

Id. at 682.

In this case, the petitioners were allowed to appear in court, but, once there, were blinded and gagged; kept in the dark and denied their right to present their case in an effective manner. They were, in sum, denied their rights under the First Amendment to the United States Constitution.

CONCLUSIONS

The reassertion, by this Court, of the rule of law governing the degree of loyalty to the bankruptcy estate required of a trustee in bankruptcy, as declared in *Mosser v. Darrow, supra*, is required. The lower courts, as demonstrated by the facts of this case, are becoming overly solicitous of the welfare of the "trustees" and overlooking the welfare of the bankrupt, its estate and creditors. That is not the intent of our Bankruptcy Law.

Also, it is submitted that this is the case in which this Court should declare whether the Federal Rules of Civil Procedure governing discovery and the other pre-trial procedures are rights protected by the First Amendment to the Constitution or, merely, guides, which can be arbitrarily denied by the courts.

Dated: January 15, 1992

Respectfully submitted,

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Attorney for Petitioners

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
December 16, 1991

No. 91-1417
BK-85-93-C

In Re: SNOWSHOE COMPANY; JOSEPH F. BURFORD;
S. FRANKLIN BURFORD

Appellants

No. 91-1418
BK-85-93-C

In Re: SNOWSHOE COMPANY

Debtor

SNOWSHOE COMPANY, a West Virginia Corporation

Plaintiff - Appellant

v.

STEPTOE & JOHNSON, a Partnership

Defendant - Appellee

No. 91-1419
BK-85-93-C

In Re: SNOWSHOE COMPANY

Debtor

UNITED STATES OF AMERICA, by the Snowshoe Company, a corporation, S. Franklin Burford and Joseph F. Burford, parties in interset, for the use of the Snowshoe Company and its creditors and stockholders, other than those with whom Steptoe & Johnson held adverse interests; SNOWSHOE COMPANY; JOSEPH F. BURFORD; S. FRANKLIN BURFORD, in their own right

Plaintiffs-Appellants

v.

MICHAEL L. BRAY; THE TRAVELERS INDEMNITY COMPANY, a corporation

Defendants - Appellees

No. 91-1431
BK-85-93-E

In Re: SNOWSHOE COMPANY; JOSEPH F. BURFORD; S. FRANKLIN BURFORD

Appellants

No. 91-1432
BK-85-93-C

In Re: SNOWSHOE COMPANY

Debtor

SNOWSHOE COMPANY, a West Virginia Corporation

Plaintiff-Appellant

v.

STEPTOE & JOHNSON, a Partnership

Defendant - Appellee

No. 91-1433
BK-85-93-C

In Re: SNOWSHOE COMPANY

Debtor

UNITED STATES OF AMERICA, by the Snowshoe Company, a corporation, S. Franklin Burford and Joseph F. Burford, parties in interest, for the use of the Snowshoe Company and its creditors and stockholders, other than those with whom Steptoe & Johnson held adverse interests; SNOWSHOE COMPANY; JOSEPH F. BURFORD; S. FRANKLIN BURFORD, in their own right

Plaintiffs - Appellants

v.

MICHAEL L. BRAY; THE TRAVELERS INDEMNITY COMPANY, a corporation

Defendants - Appellees

No. 91-1434
BK-85-93-C

In Re: SNOWSHOE COMPANY

Debtor

MICHAEL L. BRAY, Trustee

Plaintiff - Appellee

v.

S. FRANKLIN BURFORD

Defendant - Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

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Appellants' filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Hall, with the concurrence of Judge Ervin and Judge Phillips.

For the Court.

JOHN M. GREACEN
CLERK

APPENDIX B

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

In Re: Snowshoe Company; Joseph F. Burford; S. Franklin Burford.
Appellants.

No. 91-1417

In Re: Snowshoe Company,
Debtor.

Snowshoe Company, a West Virginia Corporation,
Plaintiff-Appellant,

v.

Steptoe & Johnson, a Partnership,
Defendant-Appellee.

No. 91-1418

In Re: Snowshoe Company,
Debtor.

United States of America, by the Snowshoe Company, a corporation, S. Franklin Burford and Joseph F. Burford, parties in interest, for the use of the Snowshoe Company and its creditors and stockholders, other than those with whom Steptoe & Johnson held adverse interests; Snowshoe Company; Joseph F. Burford; S. Franklin Burford, in their own right,
Plaintiffs-Appellants,

v.

Michael L. Bray; The Travelers Indemnity Company, a corporation,
Defendants-Appellees.

No. 91-1419

In Re: Snowshoe Company; Joseph F. Burford; S. Franklin Burford,
Appellants.

No. 91-1431

In Re: Snowshoe Company,
Debtor.

Snowshoe Company, a West Virginia Corporation,
Plaintiff-Appellant,

v.

Steptoe & Johnson, a Partnership,
Defendant-Appellee.

No. 91-1432

In Re: Snowshoe Company,
Debtor.

United States of America, by the Snowshoe Company, a corporation, S. Franklin Burford and Joseph F. Burford, parties in interest, for the use of the Snowshoe Company and its creditors and stockholders, other than those with whom Steptoe & Johnson held adverse interests; Snowshoe Company; Joseph F. Burford; S. Franklin Burford, in their own right,
Plaintiffs-Appellants,

v.

Michael L. Bray; The Travelers Indemnity Company, a corporation
Defendants-Appellees.

No. 91-1433

In Re: Snowshoe Company,
Debtor.

Michael L. Bray, Trustee,
Plaintiff-Appellee,
v.
S. Franklin Burford,
Defendant-Appellant.

No. 91-1434

Appeals from the United States District Court
for the Northern Distrist of West Virginia,at Elkins.
Robert L. Merhige, Jr., Senior District Judge.
(CA-85-75-E, CA-87-148-E, CA-88-84-E, CA-89-162-E,
BK-85-93-C)

Argued: October 1, 1991

Decided: November 13, 1991

Before ERVIN, Chief Judge, and HALL and PHILLIPS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Spicer Frankin Burford, Elkins, West Virginia, for Appellants. Martin R. Baach, NUSSBAUM & WALD, Washington, D.C., for Appellees. ON BRIEF: Jeffrey D. Robinson, Virginia A.S. Kling, NUSSBAUM & WALD, Washington, D.C.; Michael L. Bray, STEPTOE & JOHNSON, Clarksburg, West Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

These consolidated appeals involve two orders of the district court. Our consideration of the oral argument, the record and the district court's opinions in these cases discloses that these appeals are without merit. Accordingly, we affirm each of these orders on the reasoning of the district court. *Bray v. Burford*, No. CA-89-162-E (N.D.W. Va. Sept. 27, 1990), and *In Re: Snowshoe Co., debtor: Snowshoe Co. v. Steptoe and Johnson*, No. CA-87-148-E (N.D.W. Va. Nov. 30, 1990) (single memorandum opinion also involving consolidated cases No. CA-85-75-E and No. CA-88-84-E).

AFFIRMED

APPENDIX C

IN THE UNITED STAES DISTRICT COURT
FOR THE NORHTERN DISTRICT OF WEST VIRGINIA
WHEELING DIVISION

IN RE:
SNOWSHOE COMPANY,
Debtor

SNOWSHOE COMPANY,
Plaintiff,

v.

STEPTOE & JOHNSON
of Snowshoe Company,
Defendant.

Civil Action No. 87-148-E

IN RE:

SNOWSHOE COMPANY,
Debtor.

Civil Action No. 85-75-E

IN RE:

SNOWSHOE COMPANY,
Debtor.

UNITED STATES, ex rel.
SNOWSHOE COMPANY,
Plaintiffs,

v.

MICHAEL L. BRAY, et al.,
Defendants.

Civil Action No. 88-84-E

MEMORANDUM

These are three of numerous cases arising from and related to the bankruptcy of the Snowshoe Company ("Snowshoe"). Because the issues and parties in the three cases are duplicative, they were consolidated prior to this stage of their hearing. Plaintiffs/Appellants in these matters are S. Franklin Burford and Joseph F. Burford ("the Burfords"), acting both individually and purportedly for Snowshoe and for the United States. Defendants/Appellees are Michael Bray (Bankruptcy Trustee of Snowshoe), Steptoe & Johnson (the law firm at which Bray is a partner), and Travelers Indemnity Company. These cases are before the Court on several motions and on an appeal from a Bankruptcy Court judgment. All arise from one set of facts and essentially raise the same issues.

BACKGROUND

I. Factual Background

Snowshoe Company filed for protection under Chapter 11 of the Bankruptcy Code in March 1985 and shortly thereafter for dissolution pursuant to Chapter 7. In their Cross-Motions for Summary Judgment in Case No. 87-148-E, the parties' underlying documentation and their Statements of Material Facts as to Which There is No Genuine Issue to be Tried reveal essential agreement regarding the material facts necessary to resolve all three of these proceedings.

Snowshoe owned and operated a ski resort in West Virginia. From approximately June 1977 until the present, Appellant S. Franklin Burford has owned more than 51 percent of the outstanding shares of Snowshoe. While the company was operating, he had been an officer and director personally responsible for the operations of the company.

In these three actions, the Burfords allege the same underlying theory: that the sale of Snowshoe assets occurred as a result of a scheme, forged by Trustee Michael Bray, the law

firm of Steptoe & Johnson and Shenandoah Federal Savings & Loan ("Shenandoah") to defraud the shareholders of Snowshoe by taking the ski resort from them without fair recompense. According to the Burfords, the scheme began just after June 15, 1983, when Snowshoe's shareholders unanimously rejected an offer to purchase Snowshoe's assets by Shenandoah, which was Snowshoe's principal creditor. Following that vote, on July 13, 1983, Steptoe & Johnson partner Patrick D. Deem negotiated what the Burfords refer to as a "secret" deal, on behalf of the ABAS Company which controlled 10% of the Snowshoe stock, to assist Shenandoah in acquiring the Snowshoe assets. Pursuant to this deal, Shenandoah agreed to pay ABAS approximately an additional $300,000 if a future offer were accepted by the Snowshoe stockholders. This amount would insure that ABAS would recover its initial investment for its interest in Snowshoe. On August 18, 1983, the Snowshoe stockholders voted on and rejected a second Shenandoah offer, although ABAS voted its shares in favor of the offer. Because the offer was rejected, the Shenandoah-ABAS agreement did not come to fruition and expired by its own terms on September 15, 1983.

After the bankruptcy proceedings was converted to a Chapter 7 liquidation in May 1985, the bankruptcy Court removed Burford from control of Snowshoe and appointed Michael L. Bray trustee for the Snowshoe estate. The Court also appointed Steptoe & Johnson, a law firm of which Bray is a member, counsel for the Trustee and directed Bray to operate Snowshoe until its assets could be sold to satisfy the company's debts. Prior to the appointment, Bray revealed to the Court what he saw as his only potential conflicts: representation of three creditors of Snowshoe and representation of three Snowshoe minority shareholders, including ABAS. With his law firm's permission, Bray successfully sought the permission of these clients to withdraw from representing them in Snowshoe-related matters.

In April 1985 S. Franklin Burford, on behalf of Snowshoe, filed a suit for commercial torts and fraud against

Shenandoah and two of its officers. The suit was removed from state court to this Court. In that suit Burford subpoenaed Steptoe & Johnson partner Patrick Deem for deposition, but Steptoe & Johnson subsequently moved to quash the subpena, pending determination of an issue of federal jurisdiction. The Court granted the unopposed motion. Subsequently, Bray--as Trustee of the Snowshoe estate--sold the rights to that action to Burford.

The Trustee operated the resort during the 1985-86 ski season. He appointed Danny Seme as general manager and B.J. Hungate as Seme's assistant. After interviewing eight candidates, Bray chose Seme because Seme had experience working at Snowshoe and understood its business. Both Seme and Hungate had been investors in and officers of Tory Mountain Ski Resort, a Steptoe & Johnson client that at that time was planning to develop a resort to compete with Snowshoe.

After that season, the Trustee was able to generate four bids to purchase the company's assets. The Trustee tendered the bids to the Court, without recommending any one of them. After a hearing on the bids, the Court ordered the Trustee to sell the assets to Ski Venture, Inc., a company primarily controlled by Shenandoah. The consideration for the sale was payment of $1 million by Ski Venture to Snowshoe, assumption of Showshoe's approximately $11.8 million in loans from Shenandoah, assumption of a $1.5 million loan to Bray and assumption of purchase money secured liens in the amount of $415,272.29. The total value of the consideration therefore was approximately $14.7 million. Although the Trustee argued at the hearing that the Ski Venture bid was inadequate, pursuant to the Court's order, he sold substantially all of the assets of Snowshoe to Ski Venture in October 1986.

Relying on a 1982 appraisal of Snowshoe, Burford asserts that at the time of the sale, Snowshoe's assets were valued at more than $31 million. In addition, and somewhat undercutting his point that Snowshoe assets were sold for less than their value, Burford acknowledges that on February 19,

1985, the Bankruptcy Court, in a Memorandum Opinion, found that Snowshoe's fair market value was $19 million.

From this factual background, Burford asserts that at the time of appointment of the Trustee and during these transactions, Bray and Steptoe & Johnson held undisclosed interest adverse to those of Snowshoe. These "interests" are that Bray and Steptoe & Johnson: (1) represented three minority Snowshoe shareholders in connection with their investments prior to the bankruptcy; (2) represented these same shareholders in an effort to open a competing ski resort in West Virginia; (3) moved successfully to quash the subpoena to a Steptoe & Johnson partner Patrick Deem who was to testify regarding the ABAS "secret" deal; (4) represented three creditors of Snowshoe prior to Bray's appointment as Trustee; and (5) represented Snowshoe in connection with various tort actions against it. Although Bray admits these facts, he challenges their characterization as "undisclosed interests".

Burford further argues that Trustee Bray violated the faithful performance of his duties by taking five particular actions without revealing his "conflicts": Bray (1) hired Seme and Hungate, who were involved in the effort to open a competing ski resort, to work for Snowshoe during the 1986-86 season; (2) abandoned a legal claim against Shenandoah; (3) sold Snowshoe assets to Ski Venture substantially below their market value; (4) collected fees and expenses for services performed by the Trustee and his law firm; and (5) operated the resort at a loss of more than $4 million during the 1985-86 season. Again, Bray admits these actions, but asserts that none breached his fiduciary duties to Snowshoe.

II. Procedural Background

The somewhat torturous procedural history of these actions can be reviewed in brief. On July 9, 1987, Burford filed a civil RICO action against Steptoe & Johnson in District Court in Charleston, his first action arising from his allegation that the Trustee had acted improperly. The Court in this action granted

the defendant's motion to dismiss for failure to state a cause of action on February 1, 1988. This action was the forerunner of the three actions now before this Court, which essentially also charge that Bray and Steptoe & Johnson schemed to defraud the shareholders of Snowshoe.

The first two of the three actions, though several years old, have not progressed beyond early stages of litigation. On October 13, 1987, in the first of these actions, No. 87-148-E, Burford filed a Motion for Authorization to Sue Steptoe & Johnson on behalf of Snowshoe. Steptoe & Johnson, in June 1988, filed a Motion to Stay Proceedings in this action pending resolution of No. 88-84-E (discussed below). Burford in the second of these matters, No. 88-84-E, filed an adversary proceeding on behalf of himself, his brother Joseph F. Burford, and purportedly on behalf of Snowshoe and the United States, against Trustee Bray and the Trustee's bonding company. This action, filed June 8, 1988, aims to surcharge the trustee for alleged breach of fiduciary duties and to recover on bond from his bonding company.

In the third of these actions, No. 85-75-E (REOPENED), Burford and the other Plaintiffs/Appellants are appealing the Bankruptcy Court's denial of their Motion to Remove and Surcharge Trustee of the Snowshoe Estate Bray (the "bankruptcy appeal"). In denying this motion the Bankruptcy Court made various findings: (1) that the motion mistakenly represents that Burford is Snowshoe's attorney; (2) that the motion contains substantially the same facts as at issue in the Motion for Authorization to Sue, case No. 87-148 and therefore is duplicative; (3) that the Burford's earlier brought suit in the Southern District of West Virginia based on the same facts and conclusions set forth in this action; (4) that none of the other 200 creditors have moved for removal of the Trustee; (5) that removal of the Trustee at this date would prejudice the interests of the other creditors and would cause the estate needless expense; and (6) that the accusations do not relate to the honesty and integrity of the Trustee, but rather to the alleged bad acts of the Trustee against the Burfords. After the

Bankruptcy Court entered its Order on April 6, 1988, the Burfords timely appealed. The Appellees filed a motion to stay the appeal pending resolution of case No. 88-84-E, at which time this Court consolidated the actions.

By an Order entered September 20, 1989, the Court consolidated the three actions, which are now the subject of this Memorandum. The consolidation occurred because all three actions similarly challenge the conduct of the Trustee and his law firm aiming to remove the Trustee from his office and to recover damages on behalf of Snowshoe and the Burfords from Trustee Bray personally and from Bray's bonding company. In the September 20 Order, the Court also instructed the parties to brief the Court on two issues: (1) standing of the Plaintiffs/Appellants to bring the above referenced actions; and (2) challenges to the conduct of the Trustee in the underlying bankruptcy matter pursuant to 11 U.S.C. § 324. This Memorandum addresses those issues as well as outstanding Motions for Summary Judgment.

DISCUSSION

I. Standing

At the outset of examination of these cases, the question most troubling to the Court is whether Burford has standing to bring these three actions and if he does have standing in what capacity does he come before the Court. The Court will examine standing in each suit.

A. Motion for Authorization to Sue

In Case No. 87-148-E, Burford has filed a motion in the Snowshoe bankruptcy proceedings asking the court for leave to file a complaint on behalf of the Snowshoe Company against Steptoe & Johnson. On behalf of Snowshoe, Burford seeks to have a determination that the actions of the Trustee and others constitute a pattern of racketeering in violation of the civil RICO statute. Burford also alleges fraud and tortious interference with business relationships.

Whether Burford has standing to bring this action

depends, at least in part, on the scope of the authority of the bankruptcy Trustee. If Burford's attempt to file suit impinges on the unique authority of the Trustee, this Court cannot authorize him to bring suit on behalf of Snowshoe. Section 323 of the Bankruptcy Code, 11 U.S.C. § 323, names the bankruptcy trustee "the representative of the estate" who "has the capacity to sue and be sued." After the estate is created, although title does not vest in the Trustee himself, the Trustee is the individual through whom the estate acts. See 4 Collier on Bankruptcy para. 541.10[8] (15th ed. 1987). Accordingly, if Burford's proposed suit is property of the estate, the bankruptcy Trustee, not Burford, should decide whether or not filing the action is in the best interest of the estate. See Matter of Sinder, 102 B.R. 987 (Bankr. S.D. Ohio 1989).

Commencement of the bankruptcy case creates the estate. See 11 U.S.C. § 541(a). This estates is comprised of property that includes "all legal or equitable interests of the debtor in property as of the commencement of the case," as well as "[a]ny interest in property that the estate acquires after the commencement of the estate." *Id.* The estate therefore includes pending legal actions and potential legal actions.

In this motion, Burford turns to the Court for authorization to initiate a legal action on behalf of Snowshoe. A decision regarding whether Snowshoe should pursue a claim against Steptoe & Johnson, however, appropriately lies with bankruptcy Trustee Bray because that legal action constitutes property a part of the bankruptcy estate. Although Burford argues that Bray is an interested party concerning a decision whether to sue his own law firm, Burford's remedy does not lie in his personally usurping the power of the Trustee. Rather, should the circumstances arise, Burford may, as he has in Case No. 88-84-E, raise a question regarding the priority of the actions of the Trustee and consequently seek removal of the Trustee. See 11 U.S.C. § 324. Should Burford succeed in any such effort to remove the Trustee, then the successor Trustee would have authority to pursue an action against Steptoe & Johnson on behalf of Snowshoe. See *In re San Juan Hotel*

Corp., 847 F.2d 931, 936-37 (1st Cir. 1988).

This Court thus concludes that Burford does not have standing to sue Steptoe & Johnson on behalf of Snowshoe. As a consequence of this fact, Burford does not have standing to pursue this action, and the Court must and will dismiss Burford's motion for authorization to sue, Case No. 87-148-E.

B. Complaint for Surcharge of Trustee and Recovery on Bond

In Case No. 88-84-E, S. Franklin Burford has filed a motion seeking to surcharge the Trustee and to recover on his bond "for the use of Snowshoe Company and its creditors and stockholder," and for Snowshoe, Joseph F. Burford and himself personally. In so far as Burford purports to represent Snowshoe or the Snowshoe estate, particularly in Counts I and IV of the Complaint, for the reasons discussed above in reference to Case No. 87-148-E, this Court finds that Burford does not have standing and, to that extent, will dismiss the motion. The Complaint in this action indicates that Burford and his brother, Joseph F. Burford also are plaintiffs in their own right.

To the extent the Burfords personally seek recompense, the issue arises whether a stockholder/creditor of a debtor may bring an action seeking surcharge and removal of the Trustee of the debtor's estate (and recovery from the Trustee's bonding company). It is well-settled bankruptcy law that a Trustee may be held personally liable for a breach of his fiduciary duties. See *Mosser v. Darrow*, 341 U.S. 267 (1951); *In re Gorski*, 766 F.2d 723, 727 (2d Cir. 1985). Burford brings Counts II and III of this action as a personal stockholder/creditor of Snowshoe and the Snowshoe estate as well as on behalf of Joseph F. Burford who is in the same position. As such, he does have standing to sue Trustee Bray for the alleged fiduciary breach to recover damages that he and Joseph F. Burford have incurred. In Counts II and III of the complaint, the two plaintiffs seek damages for the alleged loss in the value of their Snowshoe stock due to Bray's actions that allegedly breached his fiduciary duties. The Burfords also seek removal of the Trustee. Resolution of these claims coincide substantively and will be

discussed below in reference to outstanding motions for summary judgment.

C. The Bankruptcy Appeal

In Case No. 85-75-E Burford appeals the Bankruptcy Court's denial of his Motion to Remove and Surcharge the Bankruptcy Trustee. Again, Burford filed this motion, like that in the former case, on behalf of the Snowshoe Company, Joseph F. Burford and himself personally; this motion was purportedly filed for the benefit of the estate. For the reasons discussed above and similar to the disposition of standing in those cases, Burford does not have authority to bring this action as a representative of Snowshoe or the Snowshoe estate. Again, for the reasons discussed above, to the extent the Burfords personally seek recompense, they may proceed with this action and this appeal.

II. Summary Judgment in Case No. 88-84-E

In Case No. 88-84-E, the Court has determined that the Burfords have standing to sue personally, and if appropriate, to recover damages from Bray for any breach of his fiduciary duty and to cause removal of Bray and appointment of an independent Trustee pursuant to 11 U.S.C. § 324. Both parties have moved for summary judgment in their favor on these issues, which they have fully briefed. Federal Rule of Civil Procedure 56 governs motions for summary judgment. Pursuant to Rule 56, summary judgment is appropriate only where parties do not dispute material facts that might affect the outcome of an action. See *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 248 (1986). To defeat summary judgment, a nonmoving party, who will bear the burden of proof at trial on a dispositive issue, must go beyond his or her pleadings with affidavits, depositions, interrogatories or other evidence to show specific facts that amount to a genuine issue for trial. *Celotex Corp. v. Catrett*. 477 U.S. 317, 324 (1985). Whether summary judgment is appropriate therefore turns on whether facts material to the issue at hand are in dispute.

A. The Law of Trustee Removal and Creditor Recovery

Pursuant to 11 U.S.C. § 324, the Court may remove a bankruptcy Trustee for cause after notice and a hearing. Section 324 proceedings may be commenced by complaints of creditors, the application of any party in interest or by the Court on its own initiative. See 2 Collier on Bankruptcy para. 324.01 (15th ed. 1987). Accordingly, Burford's complaints are sufficient to initiate such proceedings. Under Section 324, a court may remove a Trustee for a variety of reasons including for failure to perform his duties, for violations of his fiduciary duties, and for holding an interest adverse to the general interests of the estate. To succeed in a Motion to Remove, the petitioner must show "actual fraud or harm to the estate." *In re Hartley*, 50 B.R. 852, 854 (Bankr. N.D. Ohio 1985); see *In re Woodmar Realty Co.*, 294 F.2d 785 (7th Cir. 1961); *In re Haugen Constr. Serv., Inc.*, 104 B.R. 233 (Bankr. D.N.D. 1989).

In addition, a Trustee may be held personally liable for a breach of his fiduciary duties. See *Mosser v. Darrow*, 341 U.S. 267 (1951). The liability may arise due to the intentional, knowing, or negligent acts of the Trustee. See *In re Gorski*, 766 F.2d 723, 727 (2d Cir. 1985); *In re Cochise College Park, Inc.*, 703 F.2d 1339, 1357 (9th Cir. 1983). And, the liability may be imposed either for the benefit of the estate in the form of a surcharge (to benefit creditors who have been injured by the Trustee's acts) or for the benefit of a creditor in the form of damages in a direct action against the Trustee. See *In re San Juan Hotel Corp.*, 847 F.2d 931, 938 (1st Cir. 1988).

B. Application of the Law

The Burfords assert three grounds for surcharging the Trustee, recovering on bond and removing the Trustee: (1) the Trustee willfully acted to the detriment of the Snowshoe estate; (2) the Trustee worked under actual, undisclosed conflicts of interests to the detriment of the Snowshoe estate; and (3) the Trustee's actions and conflicts were the part of an alleged conspiracy with Shenandoah to transfer the assets of Snowshoe absent fair compensation to the plaintiffs. The Court will analyze the evidence underlying each of these three claims. Defendants assert and display that factual disputes exist

regarding several of the allegations underlying these claims and regarding the Burfords' characterization of actions as in breach of fiduciary duties. See Affidavit of Michael L. Bray (July 19, 1988). Because of these disputes, the Burfords' Motion for Summary Judgment cannot be granted. Bray's Cross-Motion for Summary Judgment, however, relies on the undisputed facts, as outlines above, and the Burfords have failed to present a genuine factual dispute relevant to the resolution of the cross-motion. As a matter of law, summary judgment is therefore appropriate.

1. Willful Breach of Fiduciary Duties

The Burfords argue that with six actions, Bray deliberately violated his obligation to perform his duties as Trustee in good faith: (1) "Abandoning" a claim against Shenandoah; (2) Selling Snowshoe assets to Ski Venture for less than their value; (3) Collecting fees and expenses for Trustee services; (4) Operating Snowshoe at a loss for the 1985-86 ski season; (5) Hiring Seme as Snowshoe General Manager; and (6) Hiring Hungate as Snowshoe Assistant Manager.

a. Court Authorized Actions

Defendants argue that Bray cannot be held liable or removed from his position as Trustee due to his actions that the Court specifically authorized. The general rule is that " '[r]eceivers and trustees appointed to conduct business on behalf of an estate in reorganization are . . . only liable as receivers and trustees. The are not individually liable unless they act outside their authority.' " *United States v. Sapp*, 641 F. 2d 182, 184 (4th Cir. 1981) (quoting 11 Remington on Bankruptcy § 4507 (1961)). Acts of trustees that are judicially approved are explicitly within their authority. In *Bouillon v. McClanahan*, 639 F.2d 213 (5th Cir. Unit A 1981), the Fifth Circuit explained that this rule derives from the immunity of judges for actions taken within their judicial discretion. The circuit court held that where the Trustee, "as an arm of the Court, sought and obtained Court approval of his actions, he is entitled to derived immunity." *Id.* at 214. Thus where a Court directly orders a Trustee's action, the Trustee acts with immunity. In the absence

of a specific court order, however, a factual dispute may exist regarding whether the Trustee acted within the bounds of his or her authority. See *Yadkin Valley Bank & Trust Co. v. McGee*, 819 F.2d 74, 76 (4th Cir. 1987).

Several of the six actions that Plaintiffs allege Bray took injuring the Snowshoe estate were specifically authorized by the court below. Bray may not, as the Court has stated, be held liable for these actions. First, Plaintiffs complain that Bray "abandoned" a legitimate claim against Shenandoah. This characterization misconstrues undisputed facts. The Snowshoe action against Shenandoah was first filed prior to the appointment of Bray as bankruptcy trustee. Upon his appointment, Bray reviewed the case, filed an opposition to Shenandoah's outstanding Motion to Dismiss and, after significant discovery including the deposition of two witnesses, determined that Snowshoe should abandon the suit. Bray then filed a Motion to Abandon, but prior to a hearing on that motion agreed to sell the suit to Burford for $5,000 and a 50% interest in any future recovery. Although Shenandoah opposed the sale (and Bray's Motion to Withdraw the Motion to Abandon), the Court granted Bray leave to sell the claim to Burford. Although the Court did not order Bray to sell the claim to Burford, the Court explicitly sanctioned the sale. Because the Court approved of the sale terms as in the best interests of the estate, finding that Bray breached a fiduciary duty by selling the claim would not only render a court's order ineffective, but also would compound such an intolerable result by discouraging trustees from respecting the judgment of the Court and encouraging them to join the many second-guessers of court decisions. The potency of a court order remains static in the absence of a ruling by a superior court. Therefore, as a matter of law, Trustee Bray is immune from liability arising from the sale of the Snowshoe claim against Shenandoah.

Second, the Burfords assert that Bray sold Snowshoe assets to Ski Venture for less than their fair value. This action, no less than the purported abandonment of the claim against Shenandoah, occurred at the behest of the Court. As Trustee

of Snowshoe, the Bankruptcy Court requested Bray to solicit bids for the company's assets. Bray tendered to the court no less than four bids on the property to the court, including the bid by Ski Venture which the court accepted. Although Bray objected to acceptance of this bid, he followed the direct order of the court in selling the assets to Ski Venture. Had he refused, Bray would have faced potential charges of contempt of court for disregarding the order of the court. This Court should not and will not sanction Trustee Bray for his reasonable and diligent carrying out of court orders.

Third, Plaintiffs contend that Defendant abused his authority by collecting fees and expenses from Snowshoe for Trustee services. Over the course of his tenure as Trustee, Bray submitted three applications to the Court for fees. The Burfords did not object to the first and second applications, submitted respectively in April 1986 and September 1986, and the court summarily approved them. Trustee Bray submitted the third application in January 1988 and a hearing was conducted the following month. At the hearing the court denied the Burfords' objection and granted the application. Because the court reviewed each of these applications and granted them, Bray's taking of these fees was specifically authorized. The granting of fees to individuals who take on the often arduous task of acting as bankruptcy trustees is an obvious necessity as long as courts wish to encourage competent individuals to take such positions. Where a court reviews consequent fee applications, finds them reasonable and grants them, this Court generally will not find a breach of fiduciary duty due to a Trustee's having asked for what appear to the court below to be reasonable fees. Perhaps, in a unique case, such as where a trustee has knowledge that the court below lacks, a breach of fiduciary duty may occur due to the acceptance of a fee request. This, however, is not such a case. Therefore, this Court finds that Trustee Bray did not breach a fiduciary duty by accepting fees for his services.

Fourth, Bray operated Snowshoe at a loss for the 1985-86 ski season. Two weeks after he was appointed Snowshoe

Trustee, Bray reported to the Bankruptcy Court that he could sell Snowshoe assets immediately or continue operating the resort through the ski season, hoping to attract a better offer. Trustee Bray advised the court that there was no guarantee that Snowshoe would break even if it operated through the winter, and the Trustee recognized that "from an accounting standpoint, skiing operations cannot be run profitably because of the interest accrual on debt associated with real estate development." The court nonetheless instructed Bray to operate Snowshoe through the season. The parties do not dispute that Snowshoe accrued a loss during this operating season, yet neither attributes this loss to other than normal business operations. The Burfords do not allege that Bray operated Snowshoe in a frivolous or incompetent manner or that Bray failed to give the operation due concern and attention. Thus, it is undisputed that Bray diligently followed the order of the court and Snowshoe happened to suffer a consequent loss, an outcome that the court necessarily considered when it ordered Bray to operate the ski resort during the 1985-86 season. As above, the Trustee's following the instructions of the court does not amount to a breach of any fiduciary duty of care to Snowshoe or to its stockholders.

b. Deliberate Violation of Duty Requirement

The final two actions that the Burfords contend violated Bray's fiduciary duty to Snowshoe were the hiring of Seme as Snowshoe General Manager and the hiring of Hungate as Snowshoe Assistant Manager. The Bankruptcy Code specifically authorizes a trustee of an operating debtor to make personnel decisions for the debtor absent court order. See 11 U.S.C. § 327(b). Like other acts of the trustee, such personnel decisions will give rise to personal liability of the trustee only where the trustee takes them in the willful and deliberate violation of his duties. See *United States v. Sapp*, 641 F.2d 182, 184-85 (4th Cir. 1981) ("[I]t is well settled that the trustee may not be held liable for any mistake of judgment; . . . his liability personally is 'only for acts determined to be willful and deliberate in violation of his duties.'").

Burford offers no evidence that Bray deliberately acted to violate his duties to Snowshoe. Burford assumes that because Seme and Hungate held an interest in a competing business venture their appointment violated Bray's duties. This simply is not so. In fact, that the two appointed managers were involved in other ski resort ventures underscores their experience in the field. Bray extensively interviewed candidates for the general manager's position and determined that Seme was the best qualified candidate. Seme's appointment was announced in open court absent a voiced objection and his contract was comparable to that of his predecessor. Moreso, Bray formally applied to the court for permission to hire Hungate. Burford cannot reasonably contend that the decisions to hire these two managers amounted to a deliberated violation of Bray's duties to Snowshoe. In fact, Burford fails even to demonstrate that the appointments were poor business judgment. This Court thus concludes that these actions, like the other four actions that Burford emphasizes, did not amount to a breach of Bray's fiduciary duties.

The Court thus will grant summary judgment in the favor of Defendants on issues regarding Bray's alleged breach of fiduciary duties.

2. Conflicts of Interest

The Burfords argue that Bray should be surcharged and removed as trustee because he has labored under a series of undisclosed conflicts of interest to the detriment of the Snowshoe estate. These purported conflicts include: (1) representation by the Trustee and his law firm of the ABAS group in connection with their minority investment in Snowshoe and with their investment in another proposed ski resort; (2) the Trustee's motion to quash the subpoena of Patrick Deem to testify in connection with Snowshoe's litigation against Shenandoah; (3) representation by the Trustee of three Snowshoe creditors prior to his appointment; and (4) representation by the Trustee's law firm of Snowshoe in several tort actions prior to the bankruptcy.

It is well-settled bankruptcy law that trustees may not

operate where they hold interests adverse to that of an estate. *Mosser v. Darrow*, 241 U.S. 367, 271 (1951). To disable a trustee's legitimate right to act, a conflict must, however, be actual and not simply the result of a formal relationship. In the absence of fraud and injury to the debtor's interests, potential conflicts are insufficient to remove a trustee. See *In re Freeport Italian Bakery, Inc.*, 340 F.2d 50, 54-55 (2d Cir. 1965). In addition, where a potential conflict may be grounds for removal, a party will be estopped from removing a trustee where the party knew of the conflict and failed to object over a sustained period of time. See *In re National Pub. Serv. Corp.*, 68 F. 2d 859 (2d Cir. 1934), cert. denied, 292 U.S. 641 (1934): *In re Miller*, 50 B.R. 870, 873 (Bankr. N.D. Ohio 1985).

The Burfords first contend that Bray and Steptoe & Johnson's representation of ABAS constituted a sanctionable conflict of interest. Despite vigorous objection to this relationship, the Burfords do not allege that Bray or his law firm dealt with ABAS after 1983, do not allege that any action--including the sale of Snowshoe assets to Ski Venture--bestowed a benefit on these shareholders, and do not allege that the relationship was injurious to the Snowshoe estate. The relationship may amount to a potential conflict between Bray and the estate. Yet, the Burfords were aware of the relationship from its inception in 1981 and Bray offered it to the court prior to his acceptance of the Trusteeship. In the absence of a showing of injury to the estate or even an undisclosed conflict with the interests of the estate, this Court concludes that the undisputed evidence demonstrates that the potential conflict did not mature into an actual conflict and did not demand the trustee's removal.

Second, the Burfords argue that the Trustee's submission of a motion to quash the subpoena of Patrick Deem in connection with Snowshoe's litigation against Shenandoah evinced a conflict of interest. Although the Burfords' submissions to this Court consistently ignore the fact, Bray's Motion to Quash the subpoena was founded on an inquiry regarding the court's jurisdiction to hear the Snowshoe-

Shenandoah action. Bray intended to delay the deposition only until settling the jurisdictional question. This reasonable action by Bray, well known to the Burfords prior to Bray's appointment, simply does not amount to a conflict of interest justifying removal.

Third, the Burfords assert that representation by the Trustee of three Snowshoe creditors prior to his appointment amounted to a conflict of interest. Bray, however, revealed this situation to the court at the time of his appointment and, upon the court's instruction, successfully sought the permission of these clients to withdraw from their representation. Although this representation could have matured into an actual conflict, Bray's withdrawal apparently averted that possibility. Moreover, the Burfords offer neither evidence nor allegation that this relationship in any way damaged the estate; the evidence fails even to suggest that Bray, in his role as Trustee, addressed the claims of his former clients. As such, the potential conflict did not amount to an actual conflict demanding removal of the Trustee.

Finally, the Burfords argue that Steptoe & Johnson's representation of Snowshoe in several tort actions prior to the bankruptcy created a conflict of interest. Plaintiffs do not allege that because of this representation Steptoe & Johnson is a creditor of the estate and do not allege that the relationship in any way adversely affected the estate. In short, the Burfords fail to explain how this prior representation amounts to a conflict of interest or how it may have adversely affected Bray's actions. In addition, at the time of Bray's appointment, the Burfords were aware of Bray's earlier representation of Snowshoe and failed to complain of what they now see as a detrimental conflict of interest. The Court thus concludes that this potential conflict of interest, like the others alleged, did not flare into a situation requiring the removal of the Trustee.

The Court thus will grant summary judgment in favor of Defendants on issues regarding Bray's alleged conflicts of interest.

3. <u>The Alleged Conspiracy</u>

Finally, Burford asserts that the Trustee's actions were a part of an alleged conspiracy with Shenandoah to transfer the assets of Snowshoe to Shenandoah absent fair compensation to the plaintiffs. The evidence adduced for this Motion for Summary Judgment, however, fails to provide a basis for this allegation. Throughout the course of briefing these consolidated motions, the Burfords have failed to point out a single fact that suggests a conspiracy exists between the Trustee and Shenandoah. The Burfords summarily conclude that a conspiracy--a secret deal--existed primarily based on the price that Ski Venture paid for Snowshoe assets and on Bray's representation of minority Snowshoe shareholders in connection with the 1983 attempted sale of Snowshoe to Shenandoah.

As demonstrated above, neither of these two actions amounted to a breach of fiduciary duty. Notably, Bray openly and vocally opposed the sale to Ski Venture; he only completed it on direct order of the court. In addition, the 1983 representation of ABAS in no way aided Shenandoah's attempt to gain control of Snowshoe. The 1983 representation, in fact, aimed to maximize payment to ABAS from Shenandoah, squarely in conflict with Shenandoah's interest. The Burfords also fail to assert any manner in which this former representation may have affected the 1986 sale of Snowshoe assets to Ski Venture. These actions therefore fail in any way to evidence a conspiracy between Bray and Shenandoah.

The other undisputed evidence submitted for consideration on this Motion for Summary Judgment affirmatively suggests that no conspiracy existed to transfer Snowshoe assets to Shenandoah. Throughout his administration of the estate, Bray opposed Shenandoah's interests. Bray opposed the sale of assets to Ski Venture, in which Shenandoah holds a majority interest. Bray litigated Snowshoe's claim against Shenandoah, and, rather than abandon the claim, Bray sold the claim to Burford so that the suit would continue. Based on these undisputed facts, this Court therefore concludes that a trier of fact could not infer the existence of a conspiracy between Bray and Shenandoah. The Burford's action against

Bray for conspiracy thus must fail and this Court will grant summary judgment in favor of defendants on issues related to the alleged conspiracy.

III. The Bankruptcy Appeal

In Case No. 85-75-E (REOPENED), the Burfords appeal the decision of the Bankruptcy Court issued April 6, 1988, denying their Motion to Remove and Surcharge the Trustee. The motion was grounded on the exact same allegations of fraud and improper conduct as the Motion for Authorization to Sue (case No. 87-148-E) and the Complaint for Surcharge and Recovery on Bond (Case No. 88-84-E). The Bankruptcy Court denied the motion without reaching the merits of the allegations of fraud and misrepresentation, resting its decision on procedural grounds: that the issue was already raised in another of these consolidated cases (No. 87-148-E), that the issue already had been litigated and that removal at this time would prejudice the interests of other creditors.

Because this Court has analyzed the merits of this Motion in the preceding disposal of the Cross-Motions for Summary Judgment, it need not again address the issues. For purposes of this appeal, the Summary Judgment granted Bray in Case No. 88-84-E confirms that the Bankruptcy Court's dismissal of this action should be affirmed if for no other reasons on *res judicata* grounds. See *Turshan v. Chapman*, 823 F.2d 836, 839 (4th Cir. 1987).

CONCLUSION

For the reasons stated herein, this Court will: (1) dismiss the Motion for Authorization to Sue (Case No. 87-148-E) for lack of standing; (2) grant summary judgment in favor of Trustee Bray in the action entitled Complaint for Surcharge and Recovery on Bond (Case No. 88-84-E); and affirm the Bankruptcy Court's dismissal of the Motion for Surcharge (Case No. 85-75-E (RE-OPENED). These cases have run their due course and are, unless deemed otherwise by a superior court,

concluded.

An appropriate Order will issue.

Robert A. Merhige
UNITED STATES DISTRICT JUDGE

Date November 30, 1990

APPENDIX D

IN THE UNITED STAES DISTRICT COURT
FOR THE NORHTERN DISTRICT OF WEST VIRGINIA
WHEELING DIVISION

IN RE:
SNOWSHOE COMPANY,
Debtor
SNOWSHOE COMPANY,
Plaintiff,
v.
STEPTOE & JOHNSON
of Snowshoe Company,
Defendant.

Civil Action No.
87-148-E

IN RE:
SNOWSHOE COMPANY,
Debtor.

Civil Action No.
85-75-E

IN RE:
SNOWSHOE COMPANY,
Debtor.
UNITED STATES, ex rel.
SNOWSHOE COMPANY,
Plaintiffs,
v.
MICHAEL L. BRAY, et al.,
Defendants.

Civil Action No.
88-84-E

JUDGMENT ORDER

For the reasons stated in the Memorandum this day filed, and deeming it just and proper, it is hereby ORDERED and ADJUDGED:

Plaintiffs' Motion for Authorization to Sue, Case No. 87-148-E, is DISMISSED for lack of standing.

Defendant's Cross Motion for Summary Judgment, Case No. 88-84-E (entitled Complaint for Surcharge and Recovery on Bond), is GRANTED, and Plaintiffs' Motion for Summary Judgment is DENIED.

The Bankruptcy Court's dismissal of the Motion for Surcharge, Case No. 85-75-E (RE-OPENED), is AFFIRMED.

Let the Clerk send a copy of this Order and the accompanying Memorandum to all counsel of record.

Robert A. Merhige
UNITED STATES DISTRICT JUDGE

Date November 30, 1990

APPENDIX E

IN THE UNITED STAES DISTRICT COURT
FOR THE NORHTERN DISTRICT OF WEST VIRGINIA
WHEELING DIVISION

IN RE:
SNOWSHOE COMPANY,
Debtor
SNOWSHOE COMPANY,
Plaintiff,

v.

STEPTOE & JOHNSON
of Snowshoe Company,
Defendant.

Civil Action No.
87-148-E

IN RE:
SNOWSHOE COMPANY,
Debtor.

Civil Action No.
85-75-E

IN RE:
SNOWSHOE COMPANY,
Debtor.
UNITED STATES, ex rel.
SNOWSHOE COMPANY,
Plaintiffs,

v.

MICHAEL L. BRAY, et al.,
Defendants.

Civil Action No.
88-84-E

MEMORANDUM

This action is before the Court on Plaintiff/Appellant S. Franklin Burford's Motion for Amendment of Judgment, Motion for Rehearing, and Motion for Findings of Fact. After due consideration, this Court finds these without merit and therefore will deny them.

DISCUSSION

The relevant factual background to this matter is included in the Court's Memorandum filed November 30, 1990. This Court, in that Memorandum and Order issued the same day, addressed numerous outstanding issues in these three consolidated cases. The disposition of these motions and appeals purported to be a final judgment in these cases. The two motions now before the Court essentially request that the Court re-open the case to review the November 30 decision for error. Burford argues both that this Court erred in its substantive determinations and that the case should be re-opened for factual development.

Burford contends that this Court should amend its judgment Order issued November 30, 1990. He primarily puts forward one argument, criticizing this Court's decision in Case No. 87-148-E. In reviewing that case , this Court decided that Burford may not be authorized to pursue a suit on behalf of the debtor Snowshoe Company against Bankruptcy Trustee Michael Bray and Bray's law firm, Steptoe & Johnson. Rather, this Court explained, the appropriate manner for a dissatisfied stockholder to proceed is to attempt to remove a bankruptcy trustee who fails to adequately pursue his or her duties.

Burford asserts that the decision in *In re Ira Haupt & Co.*, 398 F.2d 607 (2nd Cir. 1968), establishes that Bray's actions should lead to Burford's authorization to sue. Burford had ample opportunity--of which he availed himself--to argue the applicability of *Haupt* (which is a 1968 decision) prior to this

Court's earlier decision. In addition, the decision in *Haupt* does little to aid Burford's position. In *Haupt*, the Second Circuit held that it was improper for a bankruptcy trustee to fail to pursue or sell a potential claim of the bankrupt. *Id.* at 613. Burford's request to file suit on behalf of Snowshoe does not involve any such malfeasance on the part of Trustee Bray, involving failure to pursue pre-petition claims of the bankrupt. Accordingly, this argument does not necessitate a re-opening of this suit and this Court will deny Burford's Motion for Amendment of Judgment and for Rehearing.

Second, Burford moves this Court to re-open this case for additional fact finding. Burford's motion to enter findings of fact recovers area that this Court already has carefully perused. The motion essentially requests that the Court reconsider the conclusions that it reached in and upon which it predicated the November 30, 1990, Memorandum and Order. Burford offers no actual basis for reconsideration of the factual conclusions that this Court reached upon review of the undisputed documentary evidence. As a result, Burford's request to re-open this action for further factual development is without merit and, accordingly, will be denied.

An appropriate Order will issue.

Robert A. Merhige
UNITED STATES DISTRICT JUDGE

Date January 25, 1991

APPENDIX F

IN THE UNITED STAES DISTRICT COURT
FOR THE NORHTERN DISTRICT OF WEST VIRGINIA
WHEELING DIVISION

IN RE: SNOWSHOE COMPANY, *Debtor* SNOWSHOE COMPANY, *Plaintiff,* v. STEPTOE & JOHNSON of Snowshoe Company, *Defendant.*	Civil Action No. 87-148-E
IN RE: SNOWSHOE COMPANY, *Debtor.*	Civil Action No. 85-75-E
IN RE: SNOWSHOE COMPANY, *Debtor.* UNITED STATES, ex rel. SNOWSHOE COMPANY, *Plaintiffs,* v. MICHAEL L. BRAY, et al., *Defendants.*	Civil Action No. 88-84-E

ORDER

For the reasons stated in the Memorandum this day filed and deeming it just and proper, it is hereby ORDERED and ADJUDGED:

Plaintiff/Appellants' Motion for Amendment of Judgment and Motion for Findings of Fact is DENIED.

Let the Clerk send a copy of this Order and the accompanying Memorandum to all counsel of record.

Robert A. Merhige
UNITED STATES DISTRICT JUDGE

Date January 25, 1991